IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

XAVIER MULLINS	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.	:	NO. 06-2186

MEMORANDUM

Padova, J. **March 6, 2007**

Plaintiff Xavier Mullins brought this § 1983 action against former Deputy Sheriff Wali Shabazz and Deputy Sheriff Hugh Becker for alleged use of excessive force while he was being held in the Criminal Justice Center in Philadelphia. Following a four-day jury trial that commenced on January 24, 2007, Defendants were found not liable. We entered an Order of Judgment in favor of Defendants Shabazz and Becker and against Plaintiff in accordance with the jury verdict on January 31, 2007. Presently before the Court is Plaintiff's pro se "Motion for New Trial Pursuant to Federal Rules of Civil Procedure 59(a) & (b)" (Doc. No. 43). For the reasons that follow, Plaintiff's motion is denied.

I. BACKGROUND

Plaintiff Xavier Mullins is an inmate at SCI-Graterford. On April 8, 2005, he was transported to the Criminal Justice Center in Philadelphia for a scheduled hearing pursuant to the Pennsylvania Post Conviction Relief Act. Defendants Wali Shabazz and Hugh Becker were employed as Deputy Sheriffs and working in the cell room area of the Criminal Justice Center on April 8, 2005. Plaintiff alleged that Shabazz used excessive force when he punched and kicked Plaintiff in the face, head, and body resulting in physical injuries, including a broken jaw. Defendants, however, responded that Plaintiff's injuries were the result of a confrontation he

initiated by attacking Shabazz, and that Shabazz fought back only in self-defense and in an effort to restore order. The jury returned a verdict in favor of Defendants.

Plaintiff now moves for a new trial pursuant to Rule 59 and raises the following grounds in support of his motion: the verdict is against the weight of the evidence; the racial composition of the jury pool and jury violated his constitutional rights; the Defendants improperly withheld a list of inmates held at the Criminal Justice Center on April 8, 2005; the Court erred in excluding evidence of Plaintiff's acquittal of assault charges in a criminal trial stemming from the same incident; the Court erred in excluding testimony of Detective Fong; the Court erred in excluding the testimony of Tyreek Bullock, Donald Barrett, and Robert Hood; and the Court erred in prohibiting Plaintiff from questioning Lavond Hill on re-direct regarding Shabazz's reputation. Each ground is discussed below.

II. LEGAL STANDARD

Rule 59 provides, in relevant part, as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

Fed. R. Civ. P. 59(a). The decision to grant or deny a new trial is within the sound discretion of the trial court. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980). Under the law of this circuit, "[a] new trial is appropriate only when the verdict is contrary to the great weight of the evidence or errors at trial produce a result inconsistent with substantial justice." Sandrow v. United States, 832 F. Supp. 918, 918 (E.D. Pa. 1993) (citing Roebuck v. Drexel Univ., 852 F.2d 715, 735-36 (3d Cir. 1988)). In reviewing a motion for a new trial, the court must "view all the evidence and

inferences reasonably drawn therefrom in the light most favorable to the party with the verdict." Marino v. Ballestas, 749 F.2d 162, 167 (3d Cir. 1984) (citation and internal quotation omitted).

A trial court has limited discretion in ruling on a motion for a new trial based on the argument that the verdict is against the weight of the evidence. Greenleaf v. Garlock, Inc., 174 F.3d 352, 366 (3d Cir. 1999). Such a motion should only be granted "when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks [the court's] conscience." Id. at 366 (quoting Williamson v. Conrail, 926 F.2d 1344, 1353 (3d Cir. 1991)). Where, as here, "the subject matter of the litigation is simple and within a layman's understanding, the district court is given less freedom to scrutinize the jury's verdict than in a case that deals with complex factual determinations." Williamson, 926 F.2d at 1353.

When a motion for a new trial is based on an alleged error involving a matter within the sound discretion of the trial court, such as the court's evidentiary rulings or points of charge to the jury, the trial court has wide discretion in ruling on the motion. Griffiths v. CIGNA Corp., 857 F. Supp. 399, 410 (E.D. Pa. 1994). In evaluating a motion for a new trial on the basis of trial error, "the Court must first determine whether an error was made in the course of the trial, and then must determine whether that error was so prejudicial that refusal to grant a new trial would be inconsistent with substantial justice." Lyles v. Allstate Ins. Co., Civ. A. No. 00-628, 2000 U.S. Dist. LEXIS 18389, at *4 (E.D. Pa. Dec. 22, 2000) (internal citation omitted).

III. DISCUSSION

A. Timeliness of the motion

As an initial matter, Plaintiff's motion is timely. Pursuant to Rule 59(b), any motion for a new trial must be filed no later than 10 days after entry of the judgment. Judgment was entered on January

31, 2007 and Plaintiff filed his motion for a new trial on February 7, 2007.

B. Verdict against the weight of the evidence

Plaintiff asserts that the verdict was against the weight of the evidence, and that he proved every element of excessive force. However, the evidence at trial, viewed in the light most favorable to Defendants, was that Plaintiff was being disruptive while in his cell at the Criminal Justice Center, and that Shabazz decided to relocate Plaintiff to a separate cell where he would be less disruptive. Testimony also indicated that, in the course of being moved, Plaintiff initiated a physical confrontation with Shabazz. While there was testimony from Plaintiff and Plaintiff's witnesses that contradicted the version of events as recounted by Defendants, there was sufficient evidence for the jury to conclude that Defendants had not used excessive force against Plaintiff, and the jury's verdict does not cry out to be overturned or shock the Court's conscience. Accordingly, Plaintiff's motion for a new trial is denied with respect to this argument.

C. Racial bias in the jury pool and jury

Plaintiff makes two claims with respect to the composition of the jury and jury pool. First, Plaintiff claims that Defendants exercised a peremptory challenge to exclude the only African-American from serving on the jury solely on the basis of his race. Plaintiff further claims that there was racial bias in the jury pool because there were no Hispanics and only one African-American venireman. Defendants respond by arguing that Plaintiff did not raise a timely objection to the jury selection process or the ultimate composition of the jury. Defendants also assert that they used a peremptory challenge to remove an African-American from the jury pool, not because of his race, but because he was an employee of the City of Philadelphia. Defendants note that they used a peremptory challenge to exclude a Caucasian male who was also an employee of the City of Philadelphia.

In Batson v Kentucky, 476 U.S. 79 (1986), the United States Supreme Court held that the Fourteenth Amendment's Equal Protection Clause barred the use of peremptory challenges to exclude prospective jurors on the basis of race. The Supreme Court extended the Batson rule to civil cases in Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 631 (1991). However, failing to make a Batson objection at the time when peremptory challenges are exercised is a violation of the contemporaneous objection rule and any such objection is considered to be waived. Government of Virgin Islands v. Forte, 806 F.2d 73, 75 (3d Cir. 1986) (holding that because defendant failed to preserve his objections to the government's use of its peremptory challenges, his Batson claim was waived). The contemporaneous objection rule is important because it allows the trial court and the parties to reconsider and perhaps change their course of conduct while they are able to do so, and it aids review on appeal because the trial court makes a timely record of the claim while the parties' recollections are still fresh. Id. at 75-76. (citations omitted). A review of the record indicates that Plaintiff failed to make a contemporaneous objection to Defendants' use of their peremptory challenges. Consequently, Plaintiff's claim that Defendants impermissibly used their peremptory challenges was waived and his motion for a new trial is denied in this respect.

Like his Batson claim, Plaintiff did not previously object to the composition of the jury pool. The Jury Section and Service Act of 1968 provides that "it is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. § 1861. In civil cases, parties may challenge a court's compliance with the Jury Selection Act "before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds [for the challenge],

whichever is earlier, [and move] to stay the proceedings . . . ." Id. § 1867(c). Plaintiff did not challenge the Court's compliance with the Jury Selection Act within the requisite time period or move to stay the proceedings. Accordingly, his objection has been waived and his motion for a new trial is denied with respect to this argument.

D. Disclosure of a list of inmates

Plaintiff asserts that during discovery he requested a list of the inmates brought to the Criminal Justice Center on April 8, 2005. Plaintiff claims that Defendants intentionally failed to disclose this list and that, during the course of the trial, Defendant Becker testified as to the existence of such a list. Defendants respond by asserting that all reasonable discovery requests were accommodated, and that if any such list was requested, it was not requested in a manner that would have compelled its production during the discovery process. Defendants further argue that Plaintiff did not seek to address the failure to disclose such a list prior to or during the trial.

Plaintiff's Motion for a New Trial is the first time he presents to the Court this issue of Defendants' failure to disclose a list of inmates. During discovery, Plaintiff did file a "Motion to Compel the Production of Discovery," (Doc. No. 12), which we granted in an Order dated November 2, 2006. Attached to Plaintiff's Motion to Compel was a copy of his "First Request for Production of Documents." (Pl.'s Mot. to Compel, Exhibit B.) In this request, Plaintiff did not request a list of the inmates held at the Criminal Justice Center on April 8, 2005. Plaintiff did not file any subsequent motions to compel. The United States Court of Appeals for the Third Circuit has noted that "'counsel . . . cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time' on a claim of error." Forte, 806 F.2d at 75 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 238-39, (1940)). Plaintiff did not inform the Court of this

issue during discovery, nor did he object or inform the Court during the course of the trial when Becker allegedly testified to the existence of such a list. Accordingly, Plaintiff's Motion for a New Trial based on this claim is denied.

E. Testimony of Plaintiff's acquittal in criminal trial

Plaintiff claims that he should have been permitted to give specific testimony that he had been found not guilty by a jury of assaulting Shabazz, and that not being able to present such testimony prejudiced him and denied him a fair trial. We find no error in our decision to preclude such testimony. The standard of proof in a criminal matter is different from that in a civil matter, and admission of such evidence would have been unduly prejudicial to Defendants and likely to confuse the jury. Such evidence may be excluded pursuant to Federal Rule of Evidence 403. As this presents no error of law, Plaintiff's motion is denied in this respect.

F. Testimony of Detective Fong

Plaintiff claims that he should have been permitted to present the testimony of Detective Fong, the officer who investigated the criminal complaint filed by Shabazz and took photos of Shabazz following the incident. Plaintiff claims that Fong would have testified as to whether the photos of Shabazz's injuries were authentic and accurately depicted Shabazz's physical condition, and whether his investigation revealed that Shabazz was assaulted by Plaintiff. Plaintiff claims that without the testimony of Fong, he was not permitted the opportunity to challenge the authenticity of the photos, expose a fraud committed upon the court and himself, and present a witness who could testify about the true physical condition of Shabazz after the incident. Plaintiff further claims that the photos of Shabazz were not authentic and that the District Attorney presented the original pictures of Shabazz's injuries taken by Detective Fong at the criminal trial. Defendants respond by asserting that Plaintiff

failed to call Detective Fong to testify, and therefore, Plaintiff was not precluded from questioning Detective Fong regarding the photographs. Defendants further assert that Plaintiff did not challenge the authenticity of any photographs at the time of trial.

The record indicates that Plaintiff did not object during the trial as to the authentication of the photos of Shabazz's injuries. In fact, Plaintiff himself introduced these photographs. (1/24/07 N.T. at 73:7-12, 74:17-20.) Plaintiff cannot base his motion for a new trial on an objection to photographs that he did not first raise at trial. See Green v. Philadelphia Gas Works, 333 F. Supp. 1398, 1405 (E.D. Pa. 1971) (holding that because plaintiff failed to make a timely objection at trial to the admission of photographs, he has no standing to raise such an objection in a motion for a new trial).

The record also indicates that Plaintiff attempted to call Detective Fong as a witness. At sidebar, Plaintiff stated that the only purpose for calling Detective Fong was to question him about who he interviewed in connection with the investigation into the events in question. (1/23/07 N.T. at 88:21-23.) Defendants objected on the ground that Detective Fong's testimony was irrelevant because there was no Monell claim in this lawsuit. Defendants asserted that they themselves intended to call Detective Fong, but only for purposes introducing the photographs he took of Shabazz following the incident. (1/23/07 N.T. at 89:5-7.) We sustained the objection stating:

> I'm going to sustain the objection; however, this testimony may very well be anticipating, and therefore, relevant to a defense that the defendants these [sic] assert, but I'm going to wait and see what the defense is that they assert. And we'll make him available to him, well, they're going to call him, and he'll be available to you, rebuttal, or I may allow you to ask questions on cross-examination. But right now, I don't see any relevancy to any of the issues, any of the substantive issues in - - with respect to the elements that you have to prove.

(1/23/07 N.T. at 89:8-17.) Subsequently, Defendants did not call Detective Fong, presumably because the photographs of Shabazz taken after the incident were already introduced into evidence

by Plaintiff. Plaintiff made no other attempt to call Detective Fong as a rebuttal witness to testify as to the issues now asserted in his Motion for a New Trial. Plaintiff's own failure to call a witness cannot serve as the basis for a new trial. Consequently, Plaintiff's Motion for a New Trial is denied in this respect.

G. Testimony of Tyreek Bullock, Donald Barrett, and Robert Hood

Plaintiff claims that he should have been permitted to call Tyreek Bullock, Donald Barrett, and Robert Hood for the purpose of testifying about the untruthfulness of Shabazz. Plaintiff asserts that this testimony would have been relevant to challenge Shabazz's credibility. Plaintiff asserts that Shabazz had, on prior occasions, assaulted these three individuals while they were inmates, and then falsely accused them of assaulting him. Plaintiff further claims that Defense Attorney's questioning of Lavond Hill, in which he asked Hill about his knowledge of Shabazz, opened the door for Plaintiff to question Hill concerning Shabazz's reputation. Defendants respond that we correctly excluded the testimony of these three witnesses pursuant to Federal Rule of Evidence 404. Defendants further respond that there is no basis in law for Plaintiff's argument that he should have been able to question Hill regarding Shabazz's reputation.

Before trial, Plaintiff submitted a motion in limine seeking permission to introduce evidence of specific instances of Shabazz's conduct involving Tyreek Bullock, Donald Barrett, and Robert Hood. We denied the motion with leave to renew in an Order dated January 11, 2007. Plaintiff, in essence, now argues that this evidentiary ruling was an error and that this error warrants a new trial. Federal Rule of Evidence 404 precludes the introduction of evidence of a person's character or trait of character for the purposes of proving action in conformity therewith on a particular occasion, except as provided by rules 607, 608, or 609. Federal Rule of Evidence 608(b), which is relevant to

this discussion, provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence.

Fed. R. Evid. 608(b). Testimony by these three witness would constitute introduction of extrinsic evidence for the purposes of attacking Shabazz's character for truthfulness. This is inadmissible under Rule 608(b), and we committed no error by excluding the testimony of these three individuals. Accordingly, we deny Plaintiff's Motion in this respect.

With respect to the testimony of Hill, Defense counsel during cross-examination asked Hill: "You seem to know [Shabazz] by his name. How did you know his name?" (1/23/07 N.T. at 64:15-16.) Hill responded: "Cause he got a bad reputation there." (1/23/07 N.T. at 64:17.) Based on this colloquy, Plaintiff's counsel, at side bar, sought permission to question Hill during his re-direct regarding Shabazz's reputation on the ground that Defendant had "opened the door." (1/23/07 N.T. at 83:8.) We denied Plaintiff's request. (1/23/07 N.T. at 83:10-12.) In seeking permission to further question Hill regarding Shabazz's reputation, Plaintiff essentially sought to introduce evidence that Shabazz has a reputation for possessing a violent character and that he acted in conformity therewith during the incident involving Plaintiff. This character evidence is inadmissible under Rule 404 and does not fall into the exception provided by Rule 608. Rule 608 permits the credibility of a witness to be attacked by opinion or reputation evidence but the evidence may only refer to the witness' character for truthfulness or untruthfulness. The reputation evidence Plaintiff sought to introduce concerned Shabazz's reputation for having a violent disposition, not his reputation for truthfulness. Furthermore, Rule 403 permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury. Accordingly, we find that there was no error in our refusal to permit Plaintiff to question Hill further about Shabazz's reputation, and accordingly deny his Motion for a New Trial with respect to this argument.

An appropriate Order follows.

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ORDER

AND NOW, this 6th day of March, 2007, upon consideration of Plaintiff's "Motion for a New Trial Pursuant to Federal Rules of Civil Procedure 59(a) & (b)" (Doc. No. 43), and Defendants' Response thereto, **IT IS HEREBY ORDERED** that said motion is **DENIED**.

BY THE COURT:

s/ John R. Padova, J.
John R. Padova, J.